

Towards a Political Economy of Land: Reciprocal Rights and Duties in Private Property

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Abstract - The paper explores some fundamental aspects of a Political Economy of Land such as the definition of rights and duties in legal and ethical terms. The increasing demands of sustainability introduces the need of a critical analysis of this institution with the purpose to explain and improve the present discussion that pursue alternative forms of appropriation and use of natural resources such as land. The responsibility involved in property rights and, thus, its conception in reciprocal terms, is present in some of the most important works of economic thought, namely Classical Political Economy and Old Institutionalism. These theories present important insights to the conception of land and its exploitation. The analysis of the legal rules that define property rights in the Portuguese case stresses the rights and duties involved in property. Besides Law, a Political Economy of Land should consider Ethics, namely Land Ethics. Therefore, the paper presents an essay for the analysis of property rights through economic, legal and ethical concerns envisaging the design of a Political Economy of Land.

Keywords - Political Economy of Land, property rights, institutions, Law and Economics, Land Ethics

1. Introduction: a Multidimensional Study of Property Rights

Nowadays we face an opportunity and an urgency to reflect on property, the institution that provides control over natural resources such as land, which in part derives from the demand for sustainability and multifunctionality of agricultural production. In the Portuguese case, as in other developed countries, problems of desertification and the frequency and dimension of forestry fires are additional factors.

The reflection on landed property presented in this paper considers Economic Thought and its interface with Law and Ethics, namely Land Ethics.

The contributions of Economic Thought in the analysis of land, property, and, in some cases, landed property, recall the conception of these aspects in terms of their instrumental value (material progress) but also in terms of

its broad meaning, including the power associated legal rights, that is landed property rights. The interdisciplinary perspective adopted highlights the responsible and reciprocal nature of property rights in contrast with an absolute view of this institution, dominant in some socioeconomic contexts.

Having this in mind, the paper proposes an interdisciplinary approach to property through the consideration of contributions of Economic Thought (part two), the articulation between Economics and Law (part three and four). Part five concludes by presenting the importance of going deeper in interdisciplinary approach to property through the consideration of an ethical perspective, namely Land Ethics

2. Responsibility and Reciprocity in Private Property

Classical liberal thought presents the institution of property as a responsible and worthy one, stressing its relative nature.

In Locke, for instance, the defense of natural property rights is associated with labor and founded on “natural” and “moral” limits.

The former are imposed by nature and defined in a context of abundance:

“Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough and as good left, and more than the yet unprovided could use. So that, in effect, there was never the less left for other because of his enclosure for himself”. (Locke, 1823: 118)

The “moral” limits derive from the charge that every man should have regarding its possessions:

“Whatsoever then, he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joined to it something that is his own, and thereby makes his Property. [...] For this ‘labour’ being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others”. (Locke, 1823: 116)

“God has given us all things richly. [...]. But how far has He given it us ‘to enjoy’? As much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in. Whatever is beyond this is more than this share, and belongs to others. Nothing was made by God for man to spoil or to destroy”. (*Id.*: 117)

In Locke’s view, the introduction of money, social conventions and government, and, thus, the substitution of one state of “plenty” by one of “scarcity”, changes the natural limits but not the moral ones. These are expressed in concern of interest, the abstention of prejudicial actions and should continue to inspire the social conventions that regulate property.

If labor explains the formation of property rights “at the beginning”, the conventions allow its regulation in the next phases of historic evolution. However, the principles that inspire it steel remain. According to Locke:

“[...] For as a man had a right to all he could employ his labor upon, so he had no temptation to labour for more than he could make use of. This left no room for controversy about the title, nor for encroachment on the right of others. What portion a man carved to himself was easily seen; and it was useless, as well as dishonest, to carve himself, or take more than he needed”. (*Id.*: 126)

Smith’s considerations on property involve a criticism of some of the norms that defined it, namely inheritance law, which difficult the development of small property and the land market.

The criticism of inheritance norms is also present in Say, Malthus and Mill’s works, all of them supporting measures aimed at improving the performance of the property institution in terms of economic progress but also in terms of social justice.

The specificity of land advocated in these classical works justified some of the conclusions regarding its appropriation. In Says view, for instance, land provides a productive service – “le service productive de la terre” – that gives utility to a set of natural materials. Being possible, the appropriation of natural elements does not involve, however, absolute rights because:

“It is not the landowner that permits the nation to live, to walk and to breathe in his lands: it is the nation that permits the landowner to cultivate the soil, which she recognises as its owner, and does not concede to anyone in an exclusive way the enjoyment of public places, big roads, lakes and rivers”. (Say, 1803: 532)

The specificity of land is also presented by Malthus. According to him, land is a “God’s gift” or “nature’s gift”, explaining land surplus with the reference to “that quality of earth”.

Ricardo diverges from the other classics in this realm. According to him, the surplus or rent is explained by its scarcity, not mysterious forces of nature. Land is a resource like any other in Ricardo’s view.

Stuart Mill criticisms of property (“the primary and fundamental institution”) law, especially inheritance, are very vigorous and are justified by the specificity of land resources, in opposition with Ricardo’s approach. Responsibility and merit are the values that should inspire property. Thus, Mill’s approach to this institution goes beyond mere efficiency and includes ethical and social dimensions of concern. The following comments illustrate this aspect of Mill’s thought:

“Even in the case of cultivated land, a man whom, though only one among millions, the law permits to hold thousands of acres as his single share, is not entitled to think that all this is given to him to use and abuse, and deal with as if it concerned nobody but himself. The rents or profits which he can obtain from it are at his sole disposal; but with regard to the land, in everything which does with it, and in everything which he abstains from doing, he is morally bound, and should whenever the case admits be legally compelled, to make his interest and pleasure consistent with the public good. The species at large still retains, of its original claim to the soil of the planet which it inhabits, as much as is compatible with the purposes for which it has parted with the remainder”. (Mill, 1848: 235)

Moral references about property are present also in classical political economics critics as well as in its heirs.

Among the former, one should mention Marx's view on private appropriation of land:

"From the point of view of a higher economic form of society, the private ownership of the globe on the part of some individuals will appear as absurd as the private ownership of one man by another. Even a whole society, a nation, or even all societies together, are not the owners of the globe. They are only its 'possessors', its users, and they have to hand it down to the coming generations in an improved condition, like good fathers of families". (Marx, 1867: 101)

Among the latter, it is important to mention Marshall and Walras.

In his references about landed property, Marshall adopts a poetic style and stresses the moral and aesthetic qualities involved in agriculture.

To Walras, the appropriation of scarce things is something that should be considered in the context of Social Economics, which is the domain of the interindividual relations, distinct from the domain that analyses the relation between man and materials – Pure Economics. In the case of land, concerns of social justice would justify its nationalization. In his own words:

"The fact that land is a thing and that, to this extent, it may belong to people, that is human beings, is something that we can understand. But why not to everyone, to all men in a collective manner? Why only to some people, to some men individually? Why to John more than to Paul? Why to you rather than to us? This is something that is for us completely impossible to understand". (Walras, 1896: 33-34)

"Land does not belong to all men of one generation; it belongs to humanity, that is, to all of human generations [...]. In legal terms, the humanity is the owner and the present generation is usufructuary". (*Id.*: 219)

In spite of these social and moral considerations, the purposes of objectivity and scientificity oriented Economics in other direction. In neoclassical view, the maximization *calculus* is the only criteria for decisions concerning the use of resources. The absence of institutions analysis in

neoclassical framework introduces the necessity to consider alternative economic approaches.

The study of norms and conventions that influence the control of resources needed for human livelihood is central in the works of American institutionalists, namely Veblen (1857-1929) and Commons (1862-1945).

Commons reflections on property emphasize formal norms, namely legal ones. According to him:

"The changes in the meaning of the economic equivalent of property as assets and liabilities have made necessary a deeper analysis of the meaning of the term rights as used in jurisprudence". (Commons, 1934: 17)

In his efforts to clarify the concept of *rights*, Commons specifies that a "right" always presupposes a correlative duty, it is legally protected and should not be confused with privileges, uses, etc. Besides this *correlative* dimension, rights involve also *reciprocal* duties according to Commons view:

"An authorized right cannot be defined without going in the circle of defining its correlative (corresponding) and exactly equivalent duty of others. One is the 'I' side, the other is the 'you' side, one the beneficial, the other the burdensome side of the identical transactions. [...] [...] there is an equality, that is, correspondence, of one's rights and other's duties. But at the same time, a right cannot exist without some deduction, however great or small, by virtue of a reciprocal duty clinging to it and diminishing its possible benefits". (Commons, 1934: 131)

Like *correlativity*, the notion of *reciprocity* introduces a dynamic perspective of rights involved in property, because:

- i) It introduces the idea of *limit* that is present in rights, stressing their relative nature - there are no absolute rights;
- ii) It defines the space of individual decision as one which is influenced by collective action presented in norms, namely legal norms;
- iii) It allows the view of individual decision as encompassing (also) *duties*.

The idea of responsibility associated with the appropriation and exploitation of resources in classic and

marginalist thought is analogous to that of reciprocity in Commons work. Both notions – responsibility and reciprocity – express the relativity of rights as a consequence of duties that individuals must and should observe regarding the possession and exploitation of things, namely land.

Besides Commons, the importance of legal rules in rights definition has also been stressed by Coase and his heirs (Property Rights School) as well as other institutionalists like Hodgson, according to whom:

“Individual property is not mere possession; it involves socially acknowledged and enforced rights. Individual property, therefore, is not a purely individual matter. It is not simply a relation between an individual and an object. It requires a powerful, customary and legal apparatus of recognition, adjudication and enforcement. Such legal systems make their first substantial appearance within the state apparatuses of ancient civilization. [...]. Since that time, states have played a major role in the establishment, enforcement and adjudication of property rights”. (Hodgson, 2002: 122)

The consideration of formal rules provides an understanding of the boundaries involved in decisions regarding the use of resources and presupposes the following ideas:

- “Property matters”; property is a central institution in economic life and should be explained;
- Property corresponds fundamentally to (legal) rights and duties involved in resources allocation in terms of *correlativity* and *reciprocity*;
- The legal norms that define the rights and duties are not unchangeable; their permeability to external changes should, however, consider the specificity of the legal system as well as the capacity to transform social values into protected (legal) rights.

3. Reciprocal Rights and Duties in Land Law – the Portuguese Case

The consideration of legal norms is present in the critical analysis of three components of the Portuguese legal system:

- The Constitution;
- The Civil Code;

- Diverse legislation in the areas of Environment, Territory, Ecology and Common Agricultural Policy (CAP).

As far as the Portuguese Constitution concerns, the idea of *reciprocity* is present in the possibility of introducing restrictions on “fundamental rights” and is a consequence of the adequacy of rights with the economic, social and political aspects of the Constitutional project, which:

“[...] implies a narrowing of the scope of powers traditionally linked to private property and an acceptance of restrictions (to the benefit of state, collectivity and other individuals) of the liberties of use, fruition and disposition”. (Canotilho e Moreira, 1993: 333)

In fact, it is possible to identify some explicit and implicit constitutional restrictions to property rights involving land. In explicit terms, these restrictions are fundamentally related with the possibility of expropriation of land in specific situations. In implicit terms, one should mention the restrictions introduced when property rights clash, for instance, with the right to “environment and quality of life”. According to the authors quoted above:

“The protection of the environment may justify restrictions to other constitutionally protected rights. Thus, for instance, the freedom to build that is commonly considered inherent to the property right, is nowadays conceived as a ‘potential freedom to build’, because it can only develop in the context of legal norms which include those of environmental protection”. (*Id.*: 348)

The Portuguese Civil Code presents the scope of property rights – *use*, *usufruct* and *disposition* – as well as other fundamental norms that contribute to its definition in terms of estate access, neighbourhood relations, abandonment situations and other agrarian issues.

In Portugal, it seems that the absence of an explicit reference to the “social function” of property constitutes an obstacle regarding the resolution of conflicts around land uses. There is considerable evidence of this in cases related with the “right to build” on land integrated in the National Agricultural Reserve. In this context, the discussion related with the potential clash between property rights and the “right to environment” has been presented in a way that considers the “rights subject”. According to one of the authors quoted above, that “subject” is no longer the “person” or “group of persons” but also the “future generations”. Besides, and following the same author, we nowadays assist to what he presents as “transfer of the problem from the rights arena to one of fundamental duties”. In his own words:

“We want to stress the need to overcome the euphoria of the individualism of fundamental rights and the implementation of a community of responsibility, of citizens and public entities regarding the ecological and environmental problems”. (Canotilho, 2005: 48)

The idea of environmentally *responsible subjects* and *future generation* reminds the conception of land as humanity's inheritance as presented by some of the economists considered in this paper and expresses the spirit of *sustainable development*.

These are values also considered in other legislation where the references to *sustainability* and *multifunctionality* of agriculture production are more frequent.

The group of diplomas related with “Environment, Territory and Ecology” constitutes a paradigmatic set of legal rules concerning rights *reciprocity*. In fact, the constitutional possibility that allows restrictions in property rights when it collides with other legal protected rights (e.g. environmental and ecological). That is the case of National Agricultural Reserve, National Ecological Reserve, Nature Network, as well as the National Network of Protected Areas which represent a significant part of the Continent of Portuguese territory.

As far as the CAP legal diplomas are concerned, the discussion around the reciprocal nature of rights has specific outlines related to the contractual nature of some restrictions as well as with their monetary compensations. This triggers criticism on the legitimacy of some CAP measures in terms of their genuine attempt to deal with environmental concerns and constitutes a peculiar type of reciprocity in the exercise of rights because they exteriorize liabilities that should be internal to farmers' decisions.

Monetary compensations present in some CAP measures, on one hand, and the constitution of territorial reserves which derive from other group of legal diplomas, on the other, correspond to the main instruments in the Portuguese legal system related with landed private property, namely farm land, in what concerns the implementation of environmental and ecological values. These instruments shape the reciprocal elements in property rights because they involve the definition of duties that landowners should observe and exclude, *de jure*, a conception of rights in absolute terms.

One should not conclude however that, *de jure*, there are no problems in Portuguese Land Law in what concerns

the implementation of environmental and ecological values. In fact, it is possible to identify normative weaknesses and inconsistencies, highlighting responsibility regarding private property. Besides CAP measures, these fragilities are also present in land abandonment legal framework. It is also interesting to observe that the absence of an explicit reference to property's “social function” in the Portuguese legal system provides the opportunity for various interpretations of what seems to constitute a sacred core of private property.

4. Concluding Remarks: Ways of Doing Right(s)

The reference to some economic theories, namely classical political economy, allowed the presentation of property rights as a responsible and reciprocal institution and, therefore, the need to consider the institutions, that is the legal rules that define reciprocal rights and duties involved in landed property. The analytical approach adopted presents an interdisciplinary nature by connecting Law and Economics.

It is important to stress that neither the economic works referred, nor the legal norms considered present an absolute notion of property. This is an institution that involves rights and duties and presents an interdependent nature.

In certain contexts, however, the property issue is difficult to address and it is not easy to interfere in owners' rights. Bromley and Hodge references to occidental farmers provide an illustration of this fact. The authors stress the conflicts of interests around land use and refer the need of a redefinition of land resources and a change in the *status quo*:

“When the agricultural sector [...] resists efforts to alter the prevailing property rights position then a struggle occurs between the presumed ‘right’ of a landowner to do as he/she wishes, and the ‘right’ of the members of society to be free from the unwanted effects of agricultural land use. The state will be under pressure to reflect the interests of those adversely affected by the externalities. But, given the apparent sanctity of property rights in land, any negotiations with the agricultural sector will start from a position of political weakness”. (Bromley and Hodge, 1990: 199)

The coexistence of property with other rights that result from other social values related, namely, with environment and ecology, give rise to questions with no easy questions such as:

- What are the limits of private property restrictions related with other private or public rights and interests?
- Should the restrictions be compensated in monetary terms?

Legal norms express a specific pattern of human-nature relationship, which is not unchangeable and, therefore, is object of reflection towards the definition of articulation forms with ecological and environmental values. Therefore, and besides Law, Economics should also consider other human sciences like Philosophy (Ethics) in the search of alternative ways of conception and implementation of human institutions that provide the control and the use of natural resources. The ethical dimension of property issues is present in important works of economic thought as already referred.

The perception of the importance of ethical concerns regarding property rights justifies the reference to Land Ethics as formulated by Aldo Leopold (1933-1948) in the context of the “concluding remarks” of this paper which has the purpose to introduce a new challenge in the research of property rights issue.

For Leopold all ethics are based on the idea of “individuals belong[ing] to a community of interdependent parts”. Land ethic “enlarges amplifies the boundaries of the community to include soils, water, plants and animals, or collectively: the land” (Leopold, 1949: 204).

The enlargement of *community* allows the redefinition of the notion of *responsibility* related with landed property as it is associated not only with the fact that land is humanity’s inheritance, as some economists uphold, but also with the fact that land presents an intrinsic value. This approach amplifies the universes of human action that have a moral sense and supposes a broad conception of rights and duties related with land (Varandas, 2004: 157). The following comment of Leopold expresses this “revolutionary proposal” (*Id.*: 155):

“We abuse land because we regard it as a commodity belonging to us. When we see land as a community which we belong, we may begin to use it with love and respect”. (Leopold, 1949: viii)

“[...] a land ethic changes the role of *Homo Sapiens* from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also the respect for the community as such” (*Id.*: 204).

Land Ethic constitutes a strong and interesting analytical path towards a more sustainable *oikos*.

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